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No. 88-1042

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTONIO DEINDE FERNANDEZ,

Petitioner,

—v.—

BARBARA J. FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY BRIEF

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The petitioner respectfully submits this brief in reply to respondent's brief in opposition to the petition.

1. Respondent, in her Statement of the Case, has set forth as facts certain matters that, in actuality, are nothing more than her *claims*. Her representations to this Court with respect to Ambassador Fernandez' actions, finances and diplomatic status have not been found to be facts by any court in this matter.

Procedurally all that has occurred at the trial court level is a hearing on, and a decision with respect to, the Ambassador's Motion to Dismiss. In that motion, Ambassador Fernandez sought a dismissal of this case based on his accredited status as an ambassador and the privileges and immunities to which he is entitled thereby under Article 31 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 ("Vienna Convention").

Respondent's claims in this matter have simply not been litigated.[1]

2. Respondent, referencing the legislative history of the Diplomatic Relations Act, dismisses the special consideration the Framers intended with respect to "cases affecting Ambassadors" as a "remarkable proposition." Respondent's Brief, 5. While the Diplomatic Relations Act, as codified at 28 U.S.C. 1351, does provide for concurrent original jurisdiction in the district courts with respect to actions involving ambassadors brought under that Act, the legislative history makes clear that there was no intention to interfere with this Court's jurisdiction. In this regard, the legislative history specifically states that any such interference would be improper:

> The district courts' jurisdiction in such suits will, however, remain concurrent with the jurisdiction of the Supreme Court. Article III, section 2, of the Constitution provides that "In all Cases affecting Ambassadors, other public Ministers and Consuls—the Supreme Court shall have original Jurisdiction." *Congress may not deny to the Supreme Court jurisdiction which is expressly granted to it by the Constitution, Marbury v. Madison*, 1 Cranch 137, 173 (1803).

S. Rep. No. 958, 95th Cong., 2d Sess. 6 *reprinted in* 1978 U.S. Code Cong. & Admin. News 1935, 1947 (emphasis added).

Congress may have expanded the forums available for the trial of permissible claims against diplomatic agents. But the non-exclusive nature of this Court's jurisdiction over cases "affecting Ambassadors" does not affect the appropriateness of utilizing the appellate jurisdiction of this Court to review claims that the assertion of jurisdiction by a state court over a

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1 Further, respondent's statements that the Ambassador's status is "contested" and merely "asserted" or "claimed" by him are simply not correct. Indeed, the petitioner's status as an ambassador is the only significant fact found by both courts below based upon the appropriate certification of the State Department and the testimony of that Department's Associate Chief of Protocol.

case affecting an ambassador conflicts with the provisions of an international treaty or convention. That is precisely the kind of a case that the Framers deemed to be so important as to come within this Court's original jurisdiction. When that kind of a case comes to this Court from a state court on certiorari, the case is infused with the same high degree of international importance that the Framers accorded such a case—an importance that fully warrants the grant of certiorari. As this Court observed in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334-35 (1816):

> *In respect to [cases affecting ambassadors], it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to all cases . . . .*
>
> The vital importance of all the cases [affecting ambassadors] to the national sovereignty, might warrant such a distinction. . . . *This class of cases . . . affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety* . . . . All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, *and, of course, should extend to all cases whatsoever.*

(Emphasis added).[2]

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2 *See also* Hamilton, *The Federalist No. 81*, in 4 Kurkland and Lerner, The Founder's Constitution, 244 (1987):

> The supreme court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers and consuls, and those in which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent,

The vital importance of a considered resolution by this Court of the issues involved in this case could not be more clear. This case directly affects foreign relations and international expectations. It directly calls into question the effect that this nation will give to two significant provisions of the Vienna Convention. The ultimate resolution of those issues, to be sure, will affect Ambassador Fernandez. But more importantly, the ultimate resolution of those issues will set the standard for types of claims that may be pursued against ambassadors under Article 31 of the Vienna Convention and the treatment that sovereign nations may expect in the future with respect to waivers of sovereign immunity under Article 32 of that Convention.

3. Without any basis whatever, respondent represents to this Court that the State Department is "apparently satisfied" and is in "apparent concurrence with the Connecticut Supreme Court's decision" and "has elected not to support petitioner before this Court." Respondent's Brief at 11. It is petitioner's understanding that, regardless of the significance of a particular case, the Solicitor General rarely, if ever, participates in the briefing as *amicus curiae* with respect to a petition for certiorari where the federal government was not a party below. Moreover, based on its brief to the Connecticut Supreme Court, it is clear that the State Department did not endorse the "back

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it is both expedient and proper, *that such questions should be submitted in the first instance to the highest judiciary of the nation.*

(Emphasis added). Storing, *The complete Anti-Federalist*, in 4 Kurkland and Lerner, The Founder's Constitution, 234 (1987) ("Should any question arise between a foreign consul and any of the citizens of the United States however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the *first* instance to be heard in the supreme court, however inconvenient to the parties, and however trifling the subject of the dispute."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 396 (1821) (recognizing that no part of this Court's original jurisdiction is "so much required by national policy" as jurisdiction over matters affecting Ambassadors); 17 Wright, Miller & Cooper, Federal Practice and Procedure, § 4050 (2d ed. 1988). ("The Supreme Court has found that the reason for establishing this branch of original jurisdiction has been concern for the delicate nature of international relations . . .").

door" approach to divorce jurisdiction over ambassadors advocated by respondent and ultimately authorized by the Connecticut Supreme Court's decision in this matter. (Brief of *Amicus Curiae* at 6, n. 3: ("We also note, in this regard, that the mere fact that real property might be involved in the ultimate resolution of this suit does not bring [this action] within the real property exception of Article 31.")). The State Department is not a party to this matter and if, despite its general policy, it sees fit to file an *amicus curiae* brief, it is certainly capable of stating its own position therein.

For all of the foregoing reasons, as well as those set forth in the Petition, petitioner, Ambassador Antonio Deinde Fernandez, respectfully requests that this Court grant certiorari in this matter.

Respectfully submitted,

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